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In the
Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-892

STENSAKER SCHIFFAHRTSGES,
Petitioner

versus

HENRY WILEY and STEVENS SHIPPING & TERMINAL COMPANY,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Stensaker Schiffahrtsges respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, dated August 5, 1977, and corrected August 22, 1977.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, rendered August 5, 1977, and corrected August 22, 1977, is reported at , and is attached hereto as Appendix A. Notice of an order denying petition for rehearing is attached hereto as Appendix B. The unreported opinion of the District Court for the Southern District of Georgia, wherein Petitioner's Motion for Judgment Notwithstanding the Verdict and Motion for New Trial as

denied, is attached hereto as Appendix C.

JURISDICTION

The decree sought to be reviewed was rendered on August 5, 1977, and corrected on August 22, 1977. Petitioner's timely Motion for Rehearing and/or Rehearing En Banc was denied on October 21, 1977. This Petition has been filed within ninety (90) days of the order denying rehearing. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.Code § 1254(1), in that Petitioner seeks review of the decision of the United States Court of Appeals for the Fifth Circuit, by writ of certiorari.

QUESTIONS PRESENTED

Petitioner is a shipowner whose vessel HANSA TRADE called at Savannah, Georgia on to load a cargo of clay in bulk. Petitioner employed Respondent Stevens Shipping & Terminal Company to load or stevedore the cargo. Respondent Henry Wiley was a longshoreman employed by Stevens to help load. On May 27, 1972, Wiley injured himself when he slipped while descending a ladder to the hold of Petitioner's ship. Wiley sued Petitioner for damages. Petitioner impleaded Stevens claiming the right to indemnity for breach of warranty of workmanlike performance, as provided by *Ryan Stevedoring Co. vs. Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). A jury found for Wiley and denied Petitioner indemnity. The District Court denied Petitioner's Motion for Judgment Notwithstanding the Verdict and alternative Motion for New Trial. The Court of Appeals affirmed. The questions presented are:

1. Whether a shipowner is entitled to indemnity from a stevedore as a matter of law where the stevedore created the condition resulting in injury to a longshoreman and the jury finds that the shipowner's conduct would not preclude indemnity.

2. Whether the District Court erred in recharging the jury that the shipowner has the duty to comply with the Safety and Health Regulations for Longshoring and that a violation would authorize a finding of negligence.

3. Whether a jury finding of a violation of the Safety and Health Regulations for Longshoring, coupled with a complete lack of evidence that the shipowner violated same, entitled a shipowner to indemnity from the stevedore as a matter of law, or to a new trial on the issue.

4. Whether the District Court erred in failing and refusing to charge on the limitations on a shipowner's olbigation to a longshoreman as set forth in *Mitchell vs. Trawler Racer, Inc.*, 362 U.S. 539, 550.

STATUTES AND REGULATIONS INVOLVED

This case arose under 28 U.S. Code § 1333 conferring original jurisdiction upon District Courts in civil cases of admiralty or maritime jurisdiction. It involves in part the Longshoreman's and Harborworker's Compensation Act, 33 U.S.Code § 901 *et seq.*, as it existed prior to its amendment in 1972. It also involves the Safety and Health Regulations for Longshoring, 19 C.F.R. § 1918 *et seq.*, particularly §§ 1918.2, 1918.25 (b) and 1918.91 (c).

STATEMENT OF THE CASE

A.

Contentions of Parties

This case involves the three-party situation of Longshoreman versus Shipowner versus Stevedore. Such cases are gradually disappearing as a result of the abolition of the right of the shipowner to indemnity from the stevedore in the 1972 Amendments to the Longshoremen's and Harborworkers' Compensation Act, *supra*. The Longshoreman contended that he was injured on May 27, 1972, aboard Shipowner's vessel HANSA TRADE at Savannah, Georgia, when he slipped while descending a ladder allegedly unsafe because of a mixture of clay dust and rainwater on the ladder. The clay dust allegedly adhered to the ladder during the course of loading that commodity in bulk. The rainwater allegedly entered through a manhole on the main deck which gave access to the ladder during a period of rain delay, or possibly through the main hatch. Shipowner and Stevedore contended that there was no rain, but if there were, that the sources of both clay and water must have been the Longshoreman's shoes, the clay adhering during loading, and the water picked up on deck while returning to the hold after the rain. The Longshoreman contended that there were violations of Safety and Health Regulations for Longshoring, 29 C.F.R. § 1918 et seq. and in particular § 1918.25(b) requiring employer prohibition of the use of visibly unsafe ladders and § 1918.91(c) requiring elimination of slippery conditions as they occur. He contended that violation of these regulations created an unseaworthy condition and constituted negligence *per se* on the part of the Shipowner. Shipowner denied that there was any unsafe condition, showing by Stevedore's records that no rain delays were recorded until well after the injury and that the weather records of the Department of Commerce showed rain only after the accident. Shipowner also sought indemnity from the Stevedore on the ground that if an unseaworthy condition existed on the vessel, it was a condition created by and/or known to the Stevedore and that any violation of the Safety Regulations were violations by the Stevedore. The Stevedore contended that there was no unseaworthy condition aboard the vessel and no violation of the Safety Regulations.

B.

Summary of the Evidence

Plaintiff Longshoreman was hired by Stevedore as a holdman to load bulk clay aboard Shipowner's vessel on May 27, 1972. He contended that it rained before he arrived at the vessel and misted rain all day. Work commenced at 8:00 A.M. Plaintiff and fellow holdman Albert Smith used the ladder to enter the hold and testified that it was in good condition, clean and dry. Access to the ladder was through a small manhole on the maindeck at the after end of the hold. About ten (10') feet of the hatch coaming extended from the after bulkhead, to which the ladder was affixed, to the open hatch square. The ladder itself was twenty (20') feet in height. Loading of bulk clay commenced at 8:30 A.M. according to Stevedore records and at 8:25 A.M. according to Georgia Ports Authority records. Loading ceased at 8:36 and did not resume until 10:18 A.M. according to Stevedore records, 8:34 until 10:10 A.M. according to Georgia Ports Authority Records. Both Ex-

hibits noted that the delay was due to belt problems. The Stevedore's Accident Report showed that the accident occurred at 8:45 A.M.

Plaintiff Longshoreman testified that rain came up and that he was ordered to stop work by his header because of the rain, so he left by means of the ladder and took shelter. He did not recall whether the cover of the access manhole was closed. When the rain stopped, he was ordered back to work. He traversed the wet decks of the ship before reaching the ladder and neither cleaned nor dried his shoes before descending. He knew that clay and water was slippery and that there was "wet clay and stuff" on the ladder when he left the hold. He thought that Albert Smith complained to the header about the condition of the ladder, but he went back down the ladder without giving the ladder or his shoes another thought.

Fellow holdman Albert Smith noted that the ladder was wet when he ascended and knew that he and plaintiff had clay on their feet. He did not close the manhole cover. On being ordered back to work he complained about the slippery conditions to the header, but the header merely told them to be careful and return to work. When he returned to the hold and found that plaintiff had injured himself, he examined the ladder and found bits of clay which he thought came from plaintiff's shoes.

Stevedore Supervisor Archie Taylor testified that Stevedore records showed no rain delays until after the injury, that he recalled no unsafe conditions on the ship, that he made the decision to stop work for rain, although the ship's officers could ask him to stop, that it is the responsibility of the last longshoreman up the ladder to close the access manhole and that he knew of nothing the ship's crew could have done to prevent the injury. The Ship did not interfere with the Stevedore operation and did not exercise any supervision over the longshoremen.

Captain Harry E. Jennings, a marine surveyor with 20 years at sea and 20 years in surveying gave his opinion after examining the Ship's Plan that rain through the main hatch opening would not get on the ladder short of a near gale. He also reviewed the Department of Commerce daily precipitation records and related that the only rain recorded for Savannah on the morning of May 27, 1972 was 9:00-10:00 A.M., .01 inch.

The case was tried before a jury. At the conclusion of the Longshoreman's evidence, Shipowner moved for a directed verdict which was denied. At the conclusion of all the evidence the Stevedore moved for a directed verdict addressing primarily the issues raised by the Longshoreman. Shipowner also moved for a directed verdict, as did the Longshoreman. All motions were denied.

C.

Charge, Verdict, Post-Trial Motions and Appeal

The Court's charge to the jury failed to include a complete description of the Shipowner's obligations as set forth in *Mitchell vs. Trawler Racer, Inc., supra,* to which Shipowner made timely exception. In the course of its deliberations, the jury asked for a re-definition of unseaworthiness. The Court did so, but also went on to state that the Shipowner was obligated to comply with the Safety and Health

Regulations for Longshoring, 29 C.F.R. § 1918. Shipowner also objected to this charge. The jury thereupon returned a verdict finding the vessel unseaworthy and Shipowner negligent, awarding the Longshoreman $250,000.00 damages and denying indemnity from the Stevedore. In its verdict on special interrogatories, the jury found that Shipowner had not engaged in conduct sufficient to preclude indemnity. Shipowner moved for judgment notwithstanding the verdict and for a new trial. Both motions were denied. Shipowner appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed. The Court of Appeals failed to deal with Shipowner's contentions of serious prejudicial error committed by the District Court. This petition for a Writ of Certiorari followed.

REASONS FOR GRANTING WRIT

This Court may be inclined initially to dispose of this case without granting a Writ of Certiorari simply because this case involves a situation which will not arise again and hence has no precedential value. Petitioner submits that this would be a serious injustice to the parties and would also be incorrect because the case does involve issues with important precedential value.

We will deal with the matter which we believe has great importance for the future in maritime law. That is the question of the impact of the safety and Health Regulations for Longshoring. 19 C.F.R. §1918 et seq. In its basic charge, the District Court did not charge the shipowner with compliance with the Regulations. However, in its recharge on unseaworthiness, the Court stated that the shipowner must comply with these Regulations and that its failure to do so would authorize the jury to find unseaworthiness or negligence. The Court of Appeals utterly failed to deal with this issue, contenting itself with upholding the jury's verdict.

The very serious issue for the maritime industry is the responsibility for compliance with the Regulations. Despite the fact that stevedores can no longer be pursued for *Ryan* indemnity, longshoremen are still suing shipowners for negligence and a key point in such cases will be: Which of the two parties, shipowner or stevedore, must comply with the Regulations and what impact will a violation have? That these issues continue to be of grave importance is borne out by the recent Fifth Circuit decision in *Gay vs Ocean Transport & Trading, Ltd.*, 546 F.2d 1233, 1239 (1977). There a longshoreman contended that the failure of his stevedore-employer to comply with the Regulations constituted negligence on the part of the shipowner. The Fifth Circuit decided that it did not, yet the District Court in the instant case told the jury precisely the opposite and the Fifth Circuit failed to correct the error.

The Regulations themselves state that they apply only to employers and not vessels, 29 C.F.R. §1918 2(b). Nevertheless, longshoremen and other harbor workers have endeavored to ground liability on a violation on a negligence *per se* basis: Examples are *Arthur vs. Flota Mercante Gran Centro Americana, S.A.*, 487 F.2d 561 (5th Cir. 1973) and *Manning vs M/V "SEA ROAD"*, 417 F.2d 603, 611-612 (5th Cir. 1969). Yet in the aforementioned cases, the violator of the regulations was the shipowner itself. In *Gay*, the Fifth Circuit narrowly circumscribed the holdings of *Arthur* and *Manning* by placing the burden of actual compliance on the stevedore-employer, which was exactly what was intended, 19 C.F.R. §1918.2(b). Nevertheless, the Dis-

trict Court and the Fifth Circuit failed to do so for Petitioner, holding it to compliance and making it liable where there was no evidence that it violated the Regulations.

The Supreme Court must speak on this issue, which remains of vital importance to the maritime industry and which critically affects the standard of care under the 1972 Amendments to the Longshoremen's and Harborworker's Compensation Act. In granting a Writ of Certiorari here, the Court can not only correct a glaring error of the lower courts, but also give guidance on a matter of great concern to the shipping community in the wake of the amended Act. This is an excellent vehicle for so doing in that it does not require the Court to deal with the other issues being considered by the lower federal courts in interpreting the intent of the Amendments.

Petitioner also believes that the Court must grant Certiorari for the purpose of enforcing its own mandate that where the stevedore creates an unseaworthy condition or fails to discover same or continues to work in the face of such a condition, then the shipowner is entitled to indemnity, *Ryan Stevedoring Co. vs Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956); *Weyerhaeuser S/S Co. vs Nacirema Operating Co., Inc.*, 355 U.S. 563 (1958). The situation here clearly dictated that Petitioner was entitled to a directed verdict on its claim for indemnity from the stevedore, or judgment notwithstanding the verdict. The stevedore created the condition. The longshoreman knew about it. It was reported to the stevedore header. There was no evidence that the shipowner was aware of the condition. The jury itself found that the shipowner was not guilty of any conduct which would preclude indemnity, *Weyerhaeuser, supra.*

Under these circumstances shipowner was entitled to a workman like performance by the stevedore in the face of a known condition. In a similar case, the Fifth Circuit has held that a spillage of coffee beans on a dock might constitute negligence, but regardless of that, the warranty of workmanlike performance requires the stevedore to act, and if it fails to do so, the shipowner should have indemnity. *Burrage vs Flota Mercante Grancolombiana*, 431 F.2d 1229, 1233 (5th Cir. 1970). In a situation involving violation of the Safety and Health Regulations for Longshoring, the stevedore, when confronted with an unsafe condition, must (a) remedy it, (b) require the shipowner to do so, or (c) order its personnel to cease work until the condition is remedied, *Brock vs. Coral Drilling*, 477 F.2d 211, 216 (5th Cir. 1973). In dealing with violations of the Regulations, the Fifth Circuit also stated:

> "While these regulations by their terms do not govern the conduct of the shipowner, we have previously held that their breach by a stevedore can impose liability on the ship for innury to a longshoreman...*and this in turn leads to indemnity from the stevedore.*" (Emphasis supplied).

Frasca vs. S/S SAFINA E. ISMAIL, 413 F.2d 259, 261 (5th Cir. 1969).

Petitioner did not violate the Regulations. If the stevedore did, then Petitioner was entitled to indemnity. The jury further found that Petitioner was not precluded from indemnity by its own conduct. In this situation, indemnity was required by this Court's decisions in *Ryan* and *Weyerhaeuser*. The District Court erred in denying same, and the Court of Appeals erred in failing to correct the District

Court. In order to correct this flagrant disregard for settled principles of maritime law as established by the decisions of this Court, a Writ of Certiorari should be granted.

A Writ of Certiorari should also be granted to correct the error of failing to give the full charge dictated by this Court in *Mitchell vs Trawler Racer, Inc.* 362 U.S. 539, 550. The Court charged this in part, but failed to give the full charge relating to the shipowner's duty to provide a seaworthy vessel and the limitations thereon. The Fifth Circuit failed to correct this error in the charge as well. Petitioner was entitled as a matter of justice to a full statement of the law as set forth by this Court. This further flaunting of the decisions of this Court calls for the granting of a Writ of Certiorari to correct the errors of the lower courts.

CONCLUSION

The Supreme Court should grant a Writ of Certiorari in this case in order to consider the critical question of the burden of compliance with the Safety and Health Regulations for Longshoring and to correct the serious injustice resulting from the charge that Petitioner was obliged to comply with them for the benefit of the employee of the stevedore. It should also grant the writ to correct the injustice in failing to direct a verdict for Petitioner on its claim for indemnity when all the evidence showed that such was required by this Courts' decisions in *Ryan* and *Weyerhaeuser.* The writ should also be granted to correct the error in failing to give the complete charge mandated by this Court in *Mitchell.*

Respectfully submitted,

CHAMLEE, DUBUS & SIPPLE

By: _____
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CERTIFICATE OF SERVICE

I ,the undersigned, hereby certify that three (3) copies of the foregoing Petition for Writ of Certiorari to the U.S. Court of Appeals, Fifth Circuit, were served on Barnard M. Portman, Smith & Portman, P.O. Box 9565, Savannah, Georgia 31402 and Edward T. Brennan, Adams, Adams, Brennan & Gardner, P.O. Box 1208, Savannah, Georgia 31402, by placing same in the U.S. Mail, postage prepaid, this 14th day of December, 1977.

Counsel for Petitioner

APPENDIX A

CORRECTED

WILEY v. STENSAKER SCHIFFAHRTSGES

Henry WILEY, Plaintiff-Appellee,

v.

STENSAKER SCHIFFAHRTSGES, Defendant-Third-Party Plaintiff-Appellant,

v.

STEVENS SHIPPING & TERMINAL COMPANY, Third-Party Defendant-Appellee,

v.

HARTFORD ACCIDENT & INDEMNITY COMPANY, Intervenor-Appellee.

No. 75-3888.

United States Court of Appeals, Fifth Circuit.

Aug. 22, 1977.

Longshoreman brought action against shipowner for injuries received when he slipped while descending ladder aboard ship. Shipowner sought recovery from stevedore. The United States District Court for the Southern District of Georgia, at Savannah, Anthony A. Alaimo, Chief Judge, entered judgment for longshoreman and shipowner appealed. The Court of Appeals, Tuttle, Circuit Judge, held that evidence made question

for jury as to unseaworthiness of ship caused by slippery condition of straight up and down steel-runged ladder and as to whether longshoreman had sufficient advance knowledge of the condition; verdict of $250,000 was not excessive where longshoreman who was 49 years old and who had regular wage scale of approximately $5 per hour was 60% disabled.

Affirmed.

1. Shipping ⇐86(3)

Evidence in suit against shipowner for injuries sustained by longshoreman while descending slippery steel-runged ladder made jury question as to unseaworthiness and as to whether longshoreman had sufficient advance knowledge of the presence of mud on the ladder.

2. Damages ⇐132(3)

Award of $250,000 to longshoreman who was 60% disabled as result of back injury, who was 49 years old, had 21-year expectancy and had regular wage scale of approximately $5 per hour was not excessive.

Appeal from the United States District Court for the Southern District of Georgia.

Before TUTTLE, MORGAN and HILL, Circuit Judges.

TUTTLE, Circuit Judge:

We find that Chief Judge Brown, writing for this Court in *LeBlanc v. Two R Drilling Co.*, 5 Cir., 527 F.2d 1316 (1976) was overly optimistic when he said: "This might be the last voyage of the now obsolete and statutorily dry-docked judgemade legal principle for indemnity for breach of the WWLP [warranty of workmanlike performance]." We have here another such case which is adequately described in appellant's brief in the following terms:

> "This is a typical pre-amendment third party (longshoreman-shipowner-stevedore) case involving claims by Henry Wiley against Stensaker Schiffahrtsges, owner of the SS Hansa Trade, based upon alleged unseaworthiness and negligence, coupled with the claimover of *Stensaker v. Stevens Shipping & Terminal Co.*, Wiley's stevedore employer, based upon the alleged breach by Stevens of the warranty of service owed Stensaker. . . ."

The jury, to whom the case was submitted, both upon the liability of the defendant shipowner and the cross-claim against the stevedore, heard evidence which would permit it to find that Wiley, while working for Stevens, slipped and injured his back while descending a ladder aboard the SS Hansa Trade; that

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at the time of the injury Wiley was engaged in loading a type of clay, which loading was accomplished by blowing the light dust-like particles of the clay into the hold of the vessel; that after a short operation in the morning a delay was called on account of rain and Wiley and his companion Smith climbed up a plain steel ladder extending some 30 feet from the lower hold of the ship; that at the termination of the work stoppage Wiley descended the ladder through an open manhole at a time when the deck of the ship was wet and when there was evidence that there was a light film of clay dust and water on the rung near the bottom of the ladder from which Wiley slipped and fell; Wiley was unable to see below his feet as he descended the ladder, and neither he nor Smith had any difficulty climbing the ladder to leave prior to the stoppage of work; the manhole cover was open long enough to permit Smith and Wiley to exit at the top of the ladder and to permit them to return and the record is unclear as to whether it was closed during the time that work was in suspension. The evidence was in dispute as to whose duty it was to maintain a cover over the manhole in the event of inclement weather. Evidence would have justified the jury finding that it was either the responsibil-

ity of the stevedore or of the ship or of both of them.

There was also introduced in evidence certain safety and health Regulations for Longshoring which provide as follows:

"(A) There shall be at least one safe and accessible ladder for each gang working in a hatch.

(B) When any fixed ladder is visibly unsafe, the employer shall prohibit its use by employees.

(C) Slippery conditions shall be eliminated as they occur."

The jury found the ship was unseaworthy and that the shipowner was negligent and that a violation of one or more of these regulations had occurred, without specifying which regulation was violated by the ship. The jury also found that the plaintiff was not guilty of contributory negligence.

As to the third party complaint by the shipowner against the stevedore, the jury found that the stevedore had not violated its warranty of workmanlike performance.

The defendant and cross-appellant appeals from judgments carrying both jury verdicts into effect. The shipowner contends that the trial court should have directed a verdict in its favor and against the plaintiff; that it should have directed a verdict in favor of the shipowner against Stevens, the stevedore;

that the trial court erred in failing to grant shipowner a judgment notwithstanding the verdict or in the alternative a new trial with respect to the plaintiff's claim against it and its claim against Stevens and finally, that the award was excessive. Appellant also has a catch-all clause criticizing the trial court for improperly "charging the jury, structuring the charge improperly, failing to sever the claims, refusing to give certain charges requested by Stensaker; recharging the jury, causing confusion and leaving the jury with no understanding of the distinction between Stensaker's obligations to Wiley and Stevens' obligation to Stensaker." We need not deal with this contention because the points urged have not been properly preserved for our review on appeal.

As indicated in the opening paragraph of this opinion, the 1972 amendment to the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901 *et seq.* have for all practical purposes done away with the triangular suit between maritime worker, shipowner and longshore contractor. *See LeBlanc v. Two R Drilling Co., supra*, at 1317.[1]

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1. The need for such amendments was great. This litigation gives some considerable strength to the argument that the pre-amendment triangular litigation was less than totally effective, for under the law as it then stood,

Presenting the combined cases, the one for the plaintiff against the ship, and the other, the case of the ship against the stevedore to a jury under a single charge at a single trial, poses a difficult problem for court and litigants in making certain that each of the parties is viewed as to the other parties in the litigation in the proper legal relationship. For instance, here, the appellant claims that as a matter of law the only basis for a determination by the jury that the vessel

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and as it applies in the instant case, a plaintiff longshoreman could obtain a recovery against a vessel and its owners if he was injured about the ship while performing his proper stevedoring duties by virtue of a defect in the ship's equipment, conditions of work or the like and the shipowner could recover over against the stevedore's employer if the finder of facts determined that the condition or occurrence which brought about the plaintiff's injury was occasioned by a failure of the stevedoring employer to perform its duties under its contract with the shipowner with reasonable safety. *See Johnson v. Warrior & Gulf Navigation Co.*, 5 Cir., 516 F.2d 73 (1975) in which we said: "The shipowner and the stevedore are under reciprocal obligations: the shipowner to provide a seaworthy vessel and to refrain from hindering performance by the stevedore and the stevedore to perform its duties with reasonable safety. *Garner v. Cities Service Tankers Corp.*, 456 F.2d 476 (5th Cir. 1972); *Waterman Steamship Corp. v. David*, 353 F.2d 660 (5th Cir. 1965), *cert. denied* 384 U.S. 972, 86 S.Ct. 1863, 16 L.Ed.2d 683 (1966)."

breached its duty of furnishing a seaworthy vessel was the conduct of Wiley himself; that Wiley's conduct is chargeable to his employer and, therefore, as a matter of law if Wiley is not barred by his own negligence, the ship is entitled to recover against the stevedore as the only perpetrator of the evil condition or thing that brought about the injury.

Appellant is of the view that it was impossible for the jury adequately to appreciate the possibility that even though Wiley was found not to be negligent, he might nevertheless have caused his employer, Stevens, to breach its warranty of workmanlike performance and thus be required to respond to the ship in indemnity for its obligation to pay the judgment to Wiley. Appellant urges that the trial court erred in not directing a verdict against Wiley on account of his negligence and against Stevens on account of the fact that if negligence there was, it was negligence only of Stevens and that the ship should be absolved.

Our main difficulty with this approach is that this is a jury trial as to which the constitutional mandate says: "No fact tried by a jury, shall be otherwise reexamined in any court of the United States, then according to the rules of the

common law." U.S.Const. Seventh Amend. The standard applied by this Court in determining whether a case should be submitted to a jury is outlined in *Boeing Co. v. Shipman*, 5 Cir., 411 F.2d 365. In that case, this Court said:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence—not just that evidence which supports the non-mover's case—but in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury."

[1] We have carefully considered the record in this case and have no doubt but that the jury's finding of unseaworthiness by reason of the conditions

that existed at the moment of Wiley's slip and fall was adequately supported. The fact that the ship permitted a loading practice which placed powdered clay particles throughout the hold in which men were working on a straight up-and-down steel runged ladder which was open to the elements was sufficient, in light of the undisputed evidence that the wetting of such clay particles, even in a light film, would create the slippery condition, to carry the day for the plaintiff both under ordinary principles of seaworthiness and by virtue of the violation of the regulations. This was strictly a jury question.

Similarly, the question of whether Wiley had sufficient advance knowledge of the presence of the dust mud on the lower rung of the ladder as he descended, following the break is strictly a matter for the jury. As we have already indicated, the jury could find that the ladder was safe when he left the hold of the ship, but that on account of the settling of the additional powdered clay and the addition of moisture following his leaving the hold, conditions changed at a time prior to his becoming aware of them. It is rare indeed that an appellate court interferes with a jury verdict dealing with contributory negligence. This is not one of such rare cases.

The principal thrust of the appellants' argument that they are entitled as a matter of law to a verdict and judgment of indemnification against the stevedoring company is that the only acts or conditions that could bring about the shipowner's liability to Wiley were acts performed by Wiley himself, which are chargeable to Stevens, the stevedore. The difficulty with this proposition is that it is impossible for us to discern from this record the basis on which the jury made a finding of unseaworthiness and a finding of negligence on the part of the ship. It is within the realm of possibility that the element of unseaworthiness found by the jury was conditions which, though caused by Wiley, may not have met the standard required to charge contractor with the claim of failing to perform its duties "with reasonable safety," *Johnson v. Warrior & Gulf Navigation Co., supra.* As stated in the *Johnson* case: "Under an implied warranty of workmanlike performance, it is the stevedore's duty to perform its services properly and safely in the face of known defects, *Burrage v. Flota Mercanti Grancolombiana*, 431 F.2d 1229 (5th Cir. 1970)." The question here is whether the conditions of the rung of the steel ladder which brought about Wiley's unfortunate fall were known to the third-party defendant. Of course knowledge

to Wiley would have been knowledge to his employer, but as already indicated, the jury was not required to determine that Wiley knew of the dangerous condition when he stepped on the lower rung of the ladder upon returning from the work interruption.

Appellant comments on the *LeBlanc* case, *supra*, as supporting his contention that the stevedore should be held liable as a matter of law, especially that part of the opinion which says:

> "If the trial court finds that contractor was aware of the dangerous condition or its employees had produced it by tracking the slime on or over the stairway steps, the court should have then determined whether contractor itself took steps (a) to remedy the unsafe condition, (b) inform shipowner of the condition and request shipowner or his crew to remedy the condition, and (c) on shipowner's failure or refusal to correct the condition whether contractor suspended operations. . . ."

527 F.2d at 1320.

It will be noted that this Court did not direct the entry of a judgment against the employer in the *LeBlanc* case even though the Court said in its opinion:

> "During the laydown on November 18, 1971 some drilling mud and water accumulated on the drilling floor of shipowner's rig and apparently was tracked onto the landing and stairway going down to the piperack by contractor's employees.
>
> As LeBlanc began to descend the stairs from the drilling floor to the piperack he slipped on the landing, fell down the stairs and injured his left leg. LeBlanc testified that though he knew the stairway was slippery, neither he nor any other employee of Gulf Coast had taken any steps to remove mud from their shoes, the piperack, the hand rails, the stairs, or the landing at the top of the stairs nor had they complained to shipowner of the presence of mud on the stairs, landing and piperack, or asked shipowner to suspend operations until the condition was remedied. (Footnote omitted)."

Thus in a fact situation which was before the Court of Appeals in a posture which would have permitted a final determination that the contractor was liable by holding merely that the trial court was clearly erroneous, this Court, instead, remanded for further proceedings. It is much clearer here that this Court should not make a finding of fact as a substitute for this jury's verdict when the liability of the contractor was no more strongly indicated than in *LeBlanc*.

In *Johnson v. Warrior & Gulf Navigation Co., supra*, this Court did reverse a judgment in favor of the contractor on the ground that it was clearly erroneous, but in doing so it construed one of the subsidiary findings of fact by the trial court in a manner that would require a finding that the stevedore's failure "was a contributing factor to Johnson's accident," 516 F.2d at 77. Moreover, the court was not there faced with the Seventh Amendment requirement with respect to a jury trial.

Appellant was not entitled to a judgment n. o. v. as against Stevens.

[2] We finally come to the appellant's claim that the jury verdict of $250,000 was excessive. As a result of his injury, the testimony on behalf of the plaintiff indicated that he was some 60% disabled. He was 49 years old and had a 21 year expectancy. He had a fourth grade education. He had worked on the waterfront for 25 years and had a regular wage scale of approximately $5 per hour and of $6.80 straight time and $10.20 for overtime at the time of trial. Straight time on a 40 hour week at this rate would be $1,169.60 per month. The evidence as to Mr. Wiley's pain and inability to perform his ordinary duties was undisputed. He testified that he had to wear a brace all of the time and that he

was in pain all of the time. He testified that he could not sit still more than a short period of time and that he has difficulty in walking or standing. The plaintiff attempted to go back to work but the pain was too severe. This testimony was consistent with the evidence given by his medical witness. No evidence, medical or otherwise, was offered by the defendant.

It has been said by this Court that "a federal appellate court does not undertake to determine whether a verdict is excessive in fact but only whether it is excessive in law," *Fruit Industries, Inc. v. Petty*, 5 Cir., 268 F.2d 391, 395, citing *New Amsterdam Casualty Co. v. Wood*, 5 Cir., 253 F.2d 71, *Atlantic Coast Line R. R. Co. v. Pidd*, 5 Cir., 197 F.2d 153, *Whiteman v. Pitrie*, 5 Cir., 220 F.2d 914 and *Atlantic Coast Line R. R. Co. v. Kammerer*, 5 Cir., 239 F.2d 115. The standard which we have used to determine whether such a verdict is excessive in law is spoken of in terms of the verdict being so large as to show "passion or prejudice" or so large as to "shock the conscience." We also repeat, what we have previously said:

"Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and . . . each case must be determined on its own facts."

268 F.2d at 395.

We conclude that although the verdict in this case was undoubtedly on the generous side, there is no basis on which we can determine that it was excessive as a matter of law.

The judgments are AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

Edward W. Wadsworth
Clerk

October 21, 1977

TO ALL PARTIES LISTED BELOW:

NO. 75-3888 - HENRY WILEY v. STENSAKER SCHIFFAHRTSGES, v. STEVEN SHIPPING ET AL. v. HARTFORD ACCIDENT & INDEMNITY CO.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing,** and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

By:Brenda M. Hauck
Deputy Clerk

**on behalf of appellant,
Stensaker Schiffahrtsges,

cc: Mr. Gustave R. Dubus, III
Mr. William E. Wright
Mr. Barnard M. Portman
Mrssrs. Edward T. Brennan
John W. Minor, Jr.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HENRY WILEY, CIVIL ACTION
Plaintiff NO. 474-96
VS.
STENSAKER SCHIFFAHRTSGES,
Defendant and
Third-Party
Plaintiff
VS.
STEVENS SHIPPING &
TERMINAL COMPANY,
Third-Party Defendant

U. S. DISTRICT COURT
Southern District of Ga.
Filed in office
8:30 A.M.
Sept. 23, 1975
s/ R. Brodie, Jr.
Deputy Clerk

ORDER DENYING MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT & IN THE ALTERNATIVE FOR A NEW TRIAL, ETC.

This is a longshoreman's (Wiley) case against the ship (Stensaker) for injuries resulting from the alleged negligence and unseaworthiness of the ship.

In a third-party complaint, Stensaker impleaded the stevedore(Stevens)

for indemnity based upon breach of the warranty of workmanlike performance.

After a trial, the case was submitted to the Jury on a special verdict in the form of special written findings upon the issues of fact, pursuant to Rule 49(a), Fed. R. Civ. P. The Jury found that Stensaker had violated the Safety and Health Regulations for Longshoring; and that the ship was unseaworthy and negligent proximately causing Wiley's injuries. Moreover, the Jury found plaintiff free of contributory negligence and the stevedore not guilty of breach of its warranty, therefore denying indemnity.

Now before the Court for resolution are Stensaker's motions for judgment notwithstanding the verdict and in the alternative for a new trial against plaintiff; and similar motions against the stevedore.

Being of the opinion that the issues were of fact for the Jury and declining, in its discretion, to substitute its opinion for that of the Jury, the Court denies the motions for new trial and for judgment notwithstanding the verdict with respect to the plaintiff.

See Boeing Company v. Shipman, 411 F. 2d 365 (5th Cir.1969); General Motors Corporation v. Dade Bonded Warehouses, 505 F.2d 1305 (5th Cir.1975);

McCullough v. United States, 442 F.2d 1011 (5th Cir.1971); Borel v. Fibreboard Paper Products Corp., 493 F.2d 1076, 1097 (5th Cir.1973); Cities Service Oil Co. v. Launey, 403 F.2d 537 (5th Cir. 1968).

The Court has some difficulty with respect to Stensaker's motions against the stevedore. See Burrage v. Flota Mercante Grancolombiana, S.A., 431 F.2d 1229 (5th Cir.1970); Johnson v. Warrior & Gulf Navigation Company, 516 F.2d 73 (5th Cir.1975). The Court is of the opinion, however, that the better course is to leave the Jury's findings undisturbed.

Accordingly, all of Stensaker's motions are denied.

So Ordered, this 23 day of September, 1975.

s/ Anthony A. Alaimo
United States District Judge

Supreme Court, U.S.
FILED
JAN 16 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-892

STENSAKER SCHIFFAHRTSGES,

Petitioner,

v.

HENRY WILEY and STEVENS SHIPPING & TERMINAL COMPANY,

Respondents.

BRIEF OF RESPONDENT STEVENS SHIPPING & TERMINAL COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion the United States Court of Appeals for the Fifth Circuit is reported at _____ and is reproduced as Petitioner's Appendix A, pages A-1 through A-16. The order dated October 21, 1977, denying the petition for rehearing is unreported and is reproduced as Petitioner's Appendix B, pages A-17 through A-18. The order of the United States District Court for the Southern District of Georgia dated September 23, 1975, denying Petitioner's motion for judgment notwithstanding the verdict or for a

new trial is unreported and is reproduced as Petitioner's Appendix C pages A-19 through A-21. The judgment of the United States District Court for the Southern District of Georgia dated July 9, 1975, is unreported and is reproduced as Respondent's Appendix A, pages 1 thru 4.

QUESTIONS PRESENTED

1. Whether the trial court properly charged the jury on the questions of negligence and unseaworthiness on the part of the vessel?

2. Whether evidence that the ship was equipped with a straight steel ladder without non-skid surfaces, coupled with evidence that the ship failed to close a manhole covering during a rainstorm, thereby allowing the ladder to become wet and slippery, was sufficient to support the jury's finding that the vessel was both negligent and unseaworthy, where the plaintiff, a longshoreman, slipped while descending the ladder in question?

3. Whether evidence that the stevedoring company (respondent) and its longshoremen, including the plaintiff, did not know or have reason to know of the slippery condition of the ladder prior to plaintiff's injury was sufficient to support the jury's finding that the negligency and unseaworthiness of the ship was not brought into play by any negligence on the part of the stevedore, and that the stevedore did not breach its warranty of workmanlike performance to the ship?

4. Whether this court should decline to exercise its powers of discretionary review where the points urged for review by Petitioner were not preserved for appeal in the courts below; where there are separate grounds which would require affirmance of the decision of the courts below; and where changes in law governing the

rights and obligations of shipowners, longshoremen and stevedores among themselves, coupled with the fact that the decision of the courts below were based primarily upon the factual determination of a jury, means that a review of this case would not result in any meaningful precedent for future cases of a similar nature?

STATUTES

This case involves in part the provisions of Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.* as they existed prior to the amendments in 1972, and also certain of the Safety and Health Regulations for Longshoring, *i.e.*, C.F.R. §§1918.25(a), 1918.25(b), and 1918.91(c).

STATEMENT OF THE CASE

This case arised out of an action by Henry Wiley, Plaintiff, against Stensaker Schiffahrtsges (Shipowner), owner of the M/V HANSA TRADE, for injuries alleged to have been incurred by Wiley while employed as a longshoreman engaged in loading bulk clay upon the HANSA TRADE. Wiley's Complaint against Stensaker alleged unseaworthiness on the part of the vessel, negligence on the part of the shipowner, and violation of the Safety and Health Regulations for Longshoring. Stensaker impleaded Stevens Shipping & Terminal Company (Stevens), the stevedore company which employed Wiley and which was engaged in loading the clay cargo aboard the HANSA TRADE at the time of the incident complained of.

The Plaintiff alleged that he slipped and injured his back while descending a straight steel rung ladder aboard the HANSA TRADE on May 27, 1972. There were no witnesses to this accident, other than the Plain-

tiff, but no evidence tending to show that Plaintiff did not slip and fall as alleged. The remaining facts of the case, however, were in sharp dispute. The Plaintiff, Wiley, and a fellow longshoreman, Smith, testified in substance that they began work at 8:00 A.M. by descending a steel rung ladder, which was some thirty feet length, to the number one hold of the HANSA TRADE, and there began spreading plastic covering on the floor of the ship in preparation for loading bulk clay. Shortly thereafter, the stevedore began blowing bulk clay into the ship until, according to Wiley and Smith, at some point during the morning, the longshoremen were ordered up on deck because of rain and the loading operations could not continue. Wiley and Smith testified that they ascended from the hold by means of the steel rung ladder which is the sole means of ingress and egress to the hold and that as they ascended the ladder, rain water was descending through the open manhole cover on deck. Smith testified that they sought shelter on board ship until the rain ceased, then returned to the manhole, where Wiley descended into the hold. Wiley descended the ladder first, and when Smith followed a few minutes later he was informed by Wiley that he (Wiley) had slipped and injured his back while descending the ladder. Smith testified that they inspected the ladder and found an accumulation of wet clay on one of the rungs. Smith at first testified that the clay had been picked up by Wiley's shoes while walking on the deck, but subsequently withdrew that conclusion and declined to speculate on where the clay might have come from. Smith testified that Wiley remained in the hold for a period of time before reporting his injury to the foreman, and thereafter remained on duty until 6:00 P.M.

The evidence was in dispute as to whether or not a dangerous condition existed prior to Wiley's fall, or if such condition existed, whether or not it was ever brought to the attention of the stevedore. Both Wiley and Smith testified that they had no difficulty in descending the ladder to begin work in the hold of the HANSA TRADE at 8:00 A.M. They further testified that they had no trouble coming up the ladder when work stopped and they were called back on deck. In the words of Mr. Smith, "We got out of there pretty good. We got out pretty good." Smith testified that he complained to the foreman, Mr. Bryant, about the slippery conditions on the deck, but admitted that he never complained about any condition of the ladder. Furthermore, although Wiley at first testified that "someone talked to the stevedore" about the condition of the ladder, he never stated whether this was before or after the accident, and he subsequently withdrew even this vague testimony, admitting that he had no recollection of whether he or anybody else ever complained about the situation down in the hold. He admitted, however, that he never objected to the header about having to go back down the ladder, and that he has no independent recollection of the ladder being wet when he left the hold. Finally, although Mr. Smith contends that he complained to his foreman about the slippery condition of the decks, it does not appear that the complaint was made before Mr. Wiley was injured, and even this testimony was contradicted by that of David Sipple, an attorney who testified that prior to trial, he took the statement of Albert Smith and that he (Smith) told Sipple that he could recall no complaints being made either to the header or the foreman regarding any condition on the ship that date.

Assuming that rain water entered the hold through the open manhole cover and thereby got on the ladder and contributed to the Plaintiff's injuries, the evidence was nonetheless in sharp dispute as to whether it was the duty of the ship or of the stevedore to close this cover, or whether the cover was ever closed during the work stoppage. The hatch was necessarily open for the length of time necessary for Wiley and Smith to leave the hold of the ship, and neither Wiley nor Smith have any independent recollection of closing the hatch. It was undisputed that main hatch covers were opened and closed mechanically, that the controls for these hatches were immediately beside the hatch openings, and that it was the duty of the ship's crew to open and close these hatches. Mr. Wiley testified that although the longshoremen "could" pull the manhole cover down when they exited the hold, if the cover had "mechanical things and bolt down," it was the responsibility of the ship's crew to secure this cover as well. As the trial judge recognized when the new trial motion was argued, even though both Wiley and Smith became confused during their testimony and referred to the manhole cover as a hatch, there was testimony that closing the hatch (manhole cover) was the responsibility of the ship's crew. And, the stevedore foreman, Mr. Taylor, testified that while they would expect the last man up the ladder to close the hatch, they are not required to do so and that it is the ultimate responsibility of the ship's crew to make the hatch weather tight.

There was a further sharp dispute as to the extent of accumulation of clay on the decks and ladder, and whether the accumulation was sufficient to warrant hosing it down or taking other corrective measures. Mr. Smith testified that he mentioned the slippery conditions

of the deck, but admits that he did not make an issue of it with his foreman, and further admits that he did not make any complaints about the condition of the ladder. Furthermore, Smith testified that he and Wiley experienced no difficulty in ascending the ladder during the work stoppage. Mr. Taylor testified that the stevedore company will clean the decks if they accumulate an excessive amount of clay, but that a light film of dust is both normal and unavoidable in this type of loading operation. There was also testimony to the effect that the loading operation had continued for only six minutes prior to Mr. Wiley's injury and that any accumulation of clay during that time would have been minimal. Mr. Smith himself testified that the film of dust on the ladder was so light when he and Wiley left the hold that "not all the time you could tell [it was there.]" Finally, Mr. Taylor testified that although a man could theoretically wipe the ladder with rags, the ladder would become covered with clay again almost immediately, and that the stevedore would have to wipe the ladder down continuously and would require one man going up and down the ladder all the time just to keep it wiped down.

There was considerably testimony as to the nature and condition of the ladder itself. There was testimony that there was no apparent structural defect in the ladder itself. Rather, the testimony was to the effect that access to the ladder was through a manhole on the deck of the ship. The ladder was a straight steel-rung ladder which descended vertically some thirty feet from the deck of the ship into the hold, with no intervening decks or landings. There were no handrails, and no holes or non-skid surfaces in the rungs of the ladder itself. From the diagram of the ship introduced into evidence, it is apparent that the ladder descended directly into the hold itself, where

bulk cargo was loaded, and so far as the diagram shows, was not shielded from the blowing cargo in any way. Wiley and Smith testified that they experienced no difficulty in descending the ladder when it was clean and dry when they first entered the ship, but Wiley testified that he slipped and fell after an accumulation of clay and water got on the ladder during a work stoppage. As noted, this ladder provided the sole means of access to and from the hold.

Despite the conflict in the evidence, the log of the ship was never introduced by the Defendant shipowner, although it was demanded by the Plaintiff and although such log would have shown whether or not work had ceased because of rain on the morning in question. Nor did any officer or crew member of the ship testify to the condition of the vessel in general or the ladder in particular; the accumulation, if any, of clay or water on the decks and ladder; the duty of ship's crew relative to closing the manhole cover during inclement weather, or whether the manhole cover or loading hatch was in fact ever closed. Nor was any explanation offered for the absence of such testimony, or any claim made that such evidence was not available to the Defendant shipowner.

The Plaintiff at the conclusion of evidence made a motion for directed verdict against the Plaintiff which was denied; and the Defendant stevedore likewise made a motion for directed verdict against the shipowner, which was denied. The Defendant shipowner did not make a motion for directed verdict against the stevedore.

Following charges to the jury, the jury returned its verdict in special interrogatories to the effect that there was a violation of the Safety and Health Regulations for Longshoring, and that that violation played a part in producing the injuries to the Plaintiff; that the motor

vessel, HANSA TRADE, was unseaworthy; that the unseaworthiness was the cause of the Plaintiff's injuries; that the ship was negligent; that the negligence of the ship was the cause of the Plaintiff's injuries; that the Plaintiff sustained damages in the amount of $250,000; that the Plaintiff was not contributorily negligent; that the unseaworthiness of the ship was not caused or brought into play by any negligence on the part of the stevedore; that the stevedore did not breach its warranty of workmanlike performance to Stensaker and that no conduct on the part of Stensaker would have precluded indemnity by Stevens. Accordingly, the jury found for the Plaintiff, Henry Wiley, and against the Defendant Stensaker, and in favor of the Third-Party Defendant, Stevens Shipping & Terminal Company, and against the Third-Party Plaintiff Stensaker. Defendant Stensaker's motions for judgment notwithstanding the verdict and for new trial were overruled by the District Court. The case was affirmed on appeal to the Court of Appeals for the Fifth Circuit, and this application for a writ of certiorari followed.

REASONS FOR DENYING WRIT

Beginning at Page 8 of its brief, Petitioner advances three reasons for granting a writ of authorities in this case: first, because the trial court erred in charging the shipowner with the duty of complying with the Safety and Health Regulations; second, because the trial court allegedly erred in failing to give the full charge from *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960); and third, because shipowner was entitled to a directed verdict against the stevedore. For the purpose of denying this writ, it would be sufficient to note that the objection to the charge were not properly preserved for appeal and

were therefore not considered by the Fifth Circuit, and that Petitioner was not entitled to a directed verdict or judgment against the stevedore because it never moved for a directed verdict against the stevedore. However, a review of the record will reveal not only that the case was properly disposed of by the courts below, but that there are no questions which call for discretionary review by this court.

a. DUTY OF SHIPOWNER TO COMPLY WITH SAFETY REGULATIONS

Relying upon *Gay v. Ocean Transport & Trading, Ltd.*, 546 F.2d 1233 (1977), Petitioner urges that the District Court erred in charging that the shipowner as well as the stevedore had the obligation to comply with the Safety and Health Regulations for Longshoring. However, no such objection was raised to the original charge of the District Court to this effect and *Gay* was neither briefed nor argued to the Court of Appeals in either Petitioner's original brief or supplemental brief. Rather, at page 26 of Petitioner's original brief to the Fifth Circuit, the Petitioner specifically acknowledged that, as the District Court had charged, a violation of the Regulation by the vessel constituted negligence on the part of the vessel. Petitioner is now asking this Court to grant a Writ and reverse the Fifth Circuit on a point which it was never asked to consider, and which is directly contrary to the position taken by the Petitioner in the courts below.

Respondent stevedore believes that the courts below correctly held that the shipowner had the duty to comply with regulations, and that the failure of the ship to do so authorized a finding of both unseaworthiness and negligence. This decision is wholly consistent with *Gay*, upon which Petitioner now relies, which held only that a

violation of the regulation *by the stevedore* was not imimputed to the shipowner. In *Gay* the longshoreman had argued that the ship had a nondelegable duty to provide him with a safe place to work. *Gay*, however, is a post-1972 amendment case. The effect of this amendment was not only to eliminate the ship's third-party action against the stevedore, but also to limit the liability of the ship to longshoremen's claims predicated on the ship's negligence, not on the no-fault concept of unseaworthiness. Under the pre-1972 law, however, which governs this case, the ship owed the longshoreman both the duty of due care and a seaworthy vessel on which to work, and the Regulations were proper measure of this duty to the longshoremen. See *Provenza v. American Export Lines, Inc.*, 324 F.2d 660 (4th Cir. 1963). Therefore, although as Petitioner points out, longshoremen are continuing to sue ships for negligence, their claim for unseaworthiness has been eliminated by the 1972 amendment, and no reconsideration of this pre-1972 case involving entirely different obligations of the ship to the longshoreman, would provide meaningful precedent for future case.

Finally, Respondent believes that no reconsideration of the applicability of the Regulations would change the result of this case. Independent of the question of the Regulations, the jury in response to the special interrogatories found that that ship was unseaworthy, that the ship was negligent, that this unseaworthiness and negligence of the ship caused the Plaintiff's injuries, that the unseaworthiness was not caused or brought into play by any negligence on the part of the stevedore, and that the stevedore did not breach its warranty of workmanlike performance. (Respondent's Appendix A, hereto attached). The evidence in this case was carefully reviewed by the Court of Appeals, and found to be sufficient to

carry the day for the Plaintiff "*both under ordinary principles of unseaworthiness* and by virtue of the violation of the regulations." (emphasis added.) Likewise, the jury's finding that the stevedore did not breach its warranty was held to be supported by the evidence. These findings of fact by the jury, approved by both the District and Circuit Court as to ordinary unseaworthiness and the warranty of workmanlike performance, constitute separate sustaining grounds for the decision below, and no reconsideration by this Court of the Safety and Health Regulations would affect the outcome of the case.

In summary, Respondent submits that this case does not require or justify the exercise by this Court of its discretionary review powers to consider the applicability of the Safety and Health Regulations where (1) the position urged by the Petitioner was neither briefed nor argued in the Court below, and this Court does not have the benefit of the Circuit Court's reasoning on the question; (2) the law governing the instant case relative of the duties of ship toward its longshoremen has since been changed, and the decision of this Court in the present case would not serve as a precedent for cases now arising under the new law; and (3) there are separate grounds for sustaining the decision of the Courts below, and the ruling urged by the Petitioner would not affect the outcome of the case as it now stands.

b. CHARGE FROM *MITCHELL v. TRAWLER RACER*

Petitioner has also requested a Writ of Certiorari because the District Court failed to give the "full charge" from *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539 (1960). This is more specific than the exception presented to the Circuit Court, where Petitioner asserted what the

Fifth Circuit termed a "catch-all" objection to the trial court's "improperly charging the jury, structuring the charges improperly, failing to sever the claims, refusing to give certain charges requested by [shipowner]; recharging the jury, causing confusion and leaving the jury with no understanding of the distinction between [shipowner's] obligation to [Plaintiff] and [stevedore's] obligation to [shipowner]." The Fifth Circuit refused to consider this objection to the charge on the grounds that Petitioner had not properly preserved it for appeal.

In its application to this Court for the Writ, Petitioner does not specify what essential part of the *Mitchell v. Trawler Racer* charge the trial court failed to give but does refer to page 550 of this Court's opinion in that case where there appears the following language:

> "What has been said is not to suggest that the owner is obligated to furnish an accident-free ship. The duty is absolute, but it is a duty only to furnish a vessel and appurtenances reasonably fit for their intended use. The standard is not perfection, but reasonable fitness; not a ship that will weather every conceivable storm or withstand every imaginable peril of the sea, but a vessel reasonably suitable for her intended service."

Respondent has reviewed the original charge of the trial court and Petitioner's objection to this charge. The trial court stated that it was not the obligation of the shipowner to furnish an "accident free ship," that it was not obligated to have the best appliances or finest of crews, only such as are reasonably proper and suitable for their intended use. Indeed, the Court repeatedly emphasized that the ship need be only reasonably fit for the intended purposes, and the only portion of the *Trawler Racer* request which was not given was that portion con-

cerning "a ship which will weather every conceivable storm or withstand every imaginable peril of the sea." Since the accident complained of occurred in calm water while the vessel was tied to a dock, a charge on "every imaginable peril of the sea" would have been unnecessary if not inappropriate to the present case.

Respondent submits that the trial court fully and fairly charged the jury on the definition of unseaworthiness, that it properly omitted the "peril of the sea language," and that the question presented by Petitioner does not call for discretionary review by this Court, especially where the point was not preserved for appeal, was neither briefed nor argued to the court below, and this court does not have the benefit of the Circuit Court's opinion on the question.

c. CLAIM FOR DIRECTED VERDICT OR JUDGMENT NOTWITHSTANDING THE VERDICT

Petitioner finally attacks the trial court and the Circuit Court for failing to grant a directed verdict or judgment notwithstanding the verdict in favor of the ship and against the stevedore. It is not necessary in this brief to summarize the testimony at length especially in view of the Circuit Court's thorough review of the same in its opinion. Although much of the testimony in the case was in conflict, the evidence would allow a jury to conclude that the Plaintiff slipped on a straight steel rung ladder which had been coated with a mixture of clay dust and water. The powdered clay adhered to the ladder during the loading operations, which involves blowing bulk powder into the hold of the ship. The clay itself was not slippery and did not become so unless mixed with water, and the jury would have been authorized to find that rainwater got onto the ladder, causing it to become slippery, because the ship's personnel failed to secure a man-

hole cover during a work stoppage. Thus, as the Circuit Court held, and contrary to the unsupported assertion of the Petitioner that the stevedore caused the unseaworthy condition, the jury's verdict that the ship was both negligent and unseaworthy could be premised either on the use by the ship of a straight steel runged ladder without a non-skid surface, or the failure of the ship to close the manhole cover to prevent rainwater from getting on the ladder and mixing with the film of powdered clay. Again contrary to the assertion of the Petitioner that the stevedore knew of the slippery condition of the ladder, there was evidence that neither the Plaintiff nor the other longshoreman had any difficulty on the ladder either descending to begin work or in exiting the the hold during the work stoppage, and that the film of clay on the ladder when they exited was so light that "not all the time you could tell it was there." No longshoreman preceded the Plaintiff back down the ladder after the work stoppage, and construction of the ladder was such that he could not observe the rungs beneath him as he descended. Thus, the evidence fully supported the conclusion that the slippery condition arose during the work stoppage; that the stevedore was not aware of this condition, and consequently the Plaintiff was not contributorily negligent and the stevedore did not breach its warranty to the ship by returning to work following the stoppage.

Questions of negligence, contributory negligence and unseaworthiness are properly questions for the jury under instruction from the trial court. Each case necessarily stands on its own facts, and, if the evidence is in conflict, cases with identical evidence may have opposite results, depending on the jury's view as to the preponderance of that evidence. Therefore, no review of the evidence in this

case by this Court would result in a meaningful precedent for future cases of a similar nature, particularly in view of the 1972 amendment which changed the obligations of the shipowner toward longshoremen working aboard his vessels.

CONCLUSION

The Supreme Court should deny the Writ of Certiorari (1) where the questions urged for review were not properly preserved for appeal in the courts below, and were not considered by the Court of Appeals; (2) where aside from the questions urged by the Petitioner, there are separate grounds which would require that the decision of the court below be affirmed; and (3) where because of the change in the law as to the obligation of the shipowner toward longshoremen working aboard the vessel, no decision of this court in the present case would provide meaningful guidance in future cases of injuries to longshoremen.

Respectfully submitted,

By _____

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By _____

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that three (3) copies of the foregoing Brief in Opposition to Petition for Certiorari were served on Barnard M. Portman, Esquire, Smith & Portman, P.C., P.O. Box 9565, Savannah, Georgia, 31402, and George H. Chamlee, Esquire, Dubus & Sipple, P.O. Box 9523, Savannah, Georgia, 31402, by placing the same in the U.S. Mail, first class, postage prepaid, this 16th day of January, 1978.

_____

Counsel for Respondent

APPENDIX A

[Filed July 9, 1975]

IN THE
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF GEORGIA
SAVANNAH DIVISION

HENRY WILEY, *Plaintiff,* *v.* STENSAKER SCHIFFAHRTSGES, *Defendant and Third-Party Plaintiff,* *v.* STEVENS SHIPPING & TERMINAL COMPANY, *Third-Party Defendant,*	)	**Civil Action No. 474-96**

JUDGMENT OF THE COURT

This action came on for trial before the Court and a jury, Honorable Anthony A. Alaimo presiding, and the issues having been duly tried and the jury having duly rendered the following verdict on special interrogatories, to-wit:

"1(a) Was there a violation of any of the Safety and Health Regulations for Longshoring previously read to you, and did this violation play any part in producing the injury to the Plaintiff?

Yes __x__ No _____

1. Was the Motor Vessel HANSA TRADE unseaworthy?

Yes __x__ No _____

2. If yes, was the unseaworthiness a cause of Plaintiff's injuries?

Yes __x__ No _____

3. Was Stensaker Schiffahrtsges negligent?

Yes __x__ No _____

4. If yes, was that negligence a cause of Plaintiff's injuries?

Yes __x__ No _____

5. If the answer to 1(a) is yes, or the answer to 1 and 2 are yes, or the answer to 3 and 4 are yes, at what amount do you fix the damages sustained by the plaintiff as a result of the accident of which he complains?

$ 250,000.00

6. Was the plaintiff, Henry Wiley, negligent?

Yes _____ No __x__

7. If yes, was that negligence a cause of the injuries?

Yes _____ No __x__

8. If the answers to 6 and 7 are yes, to what degree was plaintiff negligent?

(0% to 100%) __0__

9. If the answers to 1(a) or 1 and 2 are yes, was such unseaworthiness caused or brought into play by any negligence on the part of Plaintiff's employer, Stevens Shipping & Terminal Company, its agents or employees?

Yes _____ No __x__

10. Did Stevens Shipping & Terminal Company, its agents or employees breach its warranty to perform its job in a reasonably safe, proper and workmanlike manner?

Yes _____ No __x__

11. If the answer to 10 is yes, was such breach the legal cause of Plaintiff's injuries?

Yes _____ No __x__

12. If the answer to 10 and 11 above is yes, was the unseaworthiness or negligence, if any, by Stensaker Schiffahrtsges, the shipowner so great as to preclude it from a recovery against Stevens Shipping & Terminal Company on the stevedore's warranty of workmanlike service?

Yes _____ No __x__

CHECK THE APPROPRIATE VERDICTS:

(x) We, the jury, find for the plaintiff, Henry Wiley, and against the defendant, Stensaker Shiffahrtsges, as indicated above.

( ) We, the jury, find for the defendant, Stensaker Shiffahrtsges, and against the plaintiff, Henry Wiley, as indicated above.

( ) We, the jury, find for third-party plaintiff, Stensaker Schiffahrtsges, and against third-party defendant, Stevens Shipping & Terminal Company.

(x) We, the jury, find for third-party defendant, Stevens Shipping & Terminal Company, and against third-party plaintiff, Stensaker Schiffahrtsges."

It is therefore Ordered and Adjudged:

1. That the Plaintiff, Henry Wiley, recover of the defendant, Stensaker Schiffahrtsges, the sum of $250,000 and his costs of action.

2. With reference to the third-party suit of Stensaker Schiffahrtsges, defendant and third-party plaintiff, against Stevens Shipping & Terminal Company, third-party defendant,

It is Ordered and Adjudged:

That the third-party plaintiff take nothing, that the action be dismissed on the merits, and that third-party defendant, Stevens Shipping & Terminal Company, recover third-party plaintiff, Stensaker Schiffahrtsges, its costs of action.

3. As previously agreed among the parties, a separate judgment will be entered by the Court upon the intervening claim of Hartford Accident & Indemnity Company.

This 9th day of July, 1975.

/s/ Anthony A. Alaimo

Judge, U.S. District Court